

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LARRY ALLEN BURTON,

Plaintiff,

v.

ROBERT BURTON, *et al.*,

Defendants.

Case No. 2:20-cv-02395-JDP (PC)

ORDER GRANTING PLAINTIFF'S
APPLICATION TO PROCEED *IN FORMA
PAUPERIS*

ECF No. 2

SCREENING ORDER THAT PLAINTIFF:

(1) FILE AN AMENDED
COMPLAINT; OR

(2) NOTIFY THE COURT THAT HE
WISHES TO STAND BY HIS
COMPLAINT, SUBJECT TO
DISMISSAL OF CLAIMS AND
DEFENDANTS CONSISTENT WITH
THIS ORDER

ECF No. 1

SIXTY-DAY DEADLINE

Plaintiff Larry Allen Burton is a state prisoner proceeding without counsel in this civil rights action brought under 42 U.S.C. § 1983. He has filed a complaint alleging that defendant Caballero wrongfully confiscated his television. ECF No. 1 at 3. He also alleges that, during a cell transfer, he lost some other personal property. *Id.* The complaint, for the reasons stated below, does not state a viable claim. I will give plaintiff leave to amend. Plaintiff has also filed

¹ an application to proceed *in forma pauperis*, ECF No. 2, which I will grant.

Screening and Pleading Requirements

A federal court must screen a prisoner's complaint that seeks relief against a governmental entity, officer, or employee. *See* 28 U.S.C. § 1915A(a). The court must identify any cognizable claims and dismiss any portion of the complaint that is frivolous or malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. *See* 28 U.S.C. §§ 1915A(b)(1), (2).

A complaint must contain a short and plain statement that plaintiff is entitled to relief, Fed. R. Civ. P. 8(a)(2), and provide “enough facts to state a claim to relief that is plausible on its face,” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The plausibility standard does not require detailed allegations, but legal conclusions do not suffice. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). If the allegations “do not permit the court to infer more than the mere possibility of misconduct,” the complaint states no claim. *Id.* at 679. The complaint need not identify “a precise legal theory.” *Kobold v. Good Samaritan Reg’l Med. Ctr.*, 832 F.3d 1024, 1038 (9th Cir. 2016). Instead, what plaintiff must state is a “claim”—a set of “allegations that give rise to an enforceable right to relief.” *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1264 n.2 (9th Cir. 2006) (en banc) (citations omitted).

The court must construe a pro se litigant’s complaint liberally. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam). The court may dismiss a pro se litigant’s complaint “if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Hayes v. Idaho Corr. Ctr.*, 849 F.3d 1204, 1208 (9th Cir. 2017). However, “‘a liberal interpretation of a civil rights complaint may not supply essential elements of the claim that were not initially pled.’” *Brunsv v. Nat’l Credit Union Admin.*, 122 F.3d 1251, 1257 (9th Cir. 1997) (*quoting Ivey v. Bd. of Regents*, 673 F.2d 266, 268 (9th Cir. 1982)).

Analysis

Plaintiff alleges that, on an unspecified date, defendant Caballero issued him a television.

¹ Plaintiff will pay the filing fee in accordance with the concurrently filed collection order.

1 ECF No. 1 at 3. Three months later, Caballero allegedly confiscated the television and told
2 plaintiff that it did not belong to him. *Id.* Plaintiff claims that he “vented his frustration” and was
3 told to pack his property for a cell transfer. *Id.* Plaintiff packed his belongings into five bags, but
4 only four arrived at his new cell. *Id.* at 3-4. He does not allege which defendants, if any, he holds
5 responsible for losing the bag.² Regardless, “an unauthorized intentional deprivation of
6 property by a state employee does not constitute a violation of the procedural requirements of the
7 Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the
8 loss is available.” *Hudson v. Palmer*, 468 U.S. 517, 533 (1984). And California law provides an
9 adequate remedy post-deprivation remedy. *See Barnett v. Centoni*, 31 F.3d 813, 816-17 (9th Cir.
10 1994). Plaintiff does not allege he has availed himself of all the state law remedies available to
11 him. He alleges that he has filed prison appeals, but he does not allege that he has used the
12 California Government Claims Act, which he must do before filing an action for damages against
13 a California governmental entity or employee for loss of property. *See Cal. Gov’t Code §§ 905.2,*
14 *911.2, 945.4, 950.2.* Before recommending that this action be dismissed for failure to state a
15 claim, I will give plaintiff a chance to amend his complaint and explain why his claims should
16 proceed. If he chooses to stand on his complaint, I will recommend that it be dismissed.

17 Should plaintiff choose to amend the complaint, the amended complaint should be brief,
18 Fed. R. Civ. P. 8(a), but must state what actions each named defendant took that deprived plaintiff
19 of constitutional or other federal rights. *See Iqbal*, 556 U.S. at 678; *Jones v. Williams*, 297 F.3d
20 930, 934 (9th Cir. 2002). Plaintiff must set forth “sufficient factual matter . . . to ‘state a claim to
21 relief that is plausible on its face.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).
22 Plaintiff must allege that each defendant personally participated in the deprivation of his rights.
23 *See Jones*, 297 F.3d at 934. Plaintiff should note that a short, concise statement in which the
24 allegations are ordered chronologically will help the court identify his claims. Plaintiff should
25 describe how each defendant wronged him, the circumstances surrounding each of the claimed
26 violations, and any harm he suffered.

27

28 ² There are no allegations against defendants Burton or Blackwell in the complaint.

If plaintiff decides to file an amended complaint, the amended complaint will supersede the current complaint. *See Lacey v. Maricopa County*, 693 F. 3d 896, 907 n.1 (9th Cir. 2012) (en banc). This means that the amended complaint must be complete on its face without reference to the prior pleading. *See* E.D. Cal. Local Rule 220. Once an amended complaint is filed, the current complaint no longer serves any function. Therefore, in an amended complaint, as in an original complaint, plaintiff must assert each claim and allege each defendant's involvement in sufficient detail. The amended complaint should be titled "Amended Complaint" and refer to the appropriate case number.

Accordingly, it is ORDERED that:

1. Plaintiff's motion to proceed *in forma pauperis* (ECF No. 2) is granted.
2. Within sixty days from the service of this order, plaintiff must either file an Amended Complaint or advise the court he wishes stand by his current complaint.
3. Failure to comply with this order may result in the dismissal of this action.
4. The clerk's office is directed to send plaintiff a complaint form.

IT IS SO ORDERED.

Dated: February 1, 2021



JEREMY D. PETERSON
UNITED STATES MAGISTRATE JUDGE